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 Page

**UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA**

IN RE WESTERN STATES WHOLESALE  
 NATURAL GAS ANTITRUST LITIGATION

MDL Docket No. 1566

LEARJET, INC., et al.,

Case No. CV-S-03-1431-PMP (PAL)  
 Base File

Plaintiffs,

v.

Case No. CV-S-06-233-PMP (PAL)

ONEOK, INC., et al.,

Defendants.

J.P. MORGAN TRUST COMPANY,  
 NATIONAL ASSOCIATION, in its Capacity as  
 Trustee of FLI Liquidating Trust,

Plaintiff

Case No. CV-S-05-1331-PMP (PAL)

v.

THE WILLIAMS COMPANIES, INC., et al.,

Defendants.

**DEFENDANTS' OPPOSITION TO MOTION  
 TO APPOINT SEPARATE LEAD COUNSEL**

Defendants Duke Energy Corporation, Duke Energy Trading and Marketing Company, L.L.C., ONEOK Inc., ONEOK Energy Marketing and Trading Company, L.P., Kansas Gas Marketing Company, The Williams Companies, Inc., Williams Merchant Services Company, Inc., Williams Power Company, Inc. f/k/a Williams Energy Marketing & Trading Company, American Electric Power Company, Inc., AEP Energy Services, Inc., Dynegy Marketing & Trade, El Paso Corporation, El Paso Merchant Energy, L.P., CMS Marketing Services and Trading Company, CMS Field Services, CenterPoint Energy, Inc., Reliant Energy, Inc., Reliant Energy Services, Inc., Coral Energy Resources, L.P., Western Gas Resources, Inc., Xcel Energy, Inc., and e prime, inc. (collectively, “Defendants”) respectfully submit this Memorandum in opposition to Plaintiffs’ Motion To Appoint Separate Lead Counsel For The “Full Consideration Cases,” *i.e.*, *J.P. Morgan Trust Co. v. The Williams Companies*, No. CV-S-05-1331-PMP (PAL) (“*J.P. Morgan*”), and *Learjet, Inc. v. ONEOK, Inc.*, No. CV-S-06-233-PMP (PAL) (“*Learjet*”).

In their motion, Plaintiffs never articulate any valid basis for the appointment of separate lead counsel. There is nothing in the record to suggest that current lead counsel are unable to fulfill their responsibilities with respect to the *J.P. Morgan* or *Learjet* cases. Moreover, in the current era of instantaneous electronic service of court filings and orders, and of frequent email communications among all counsel, there is little need for lead counsel to perform their traditional functions of giving notice and acting as an information clearinghouse for other attorneys.

Because there is no justification for the appointment of separate lead counsel, it is apparent that Plaintiffs filed the present motion solely as a procedural device to allow them to re-argue the merits of the pending motions to dismiss.<sup>1</sup> But Plaintiffs’ argument against dismissal remains unavailing.

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<sup>1</sup> In another procedural stratagem, Plaintiffs’ counsel filed a joint motion in September with the Judicial Panel on Multidistrict Litigation, asking the JPML to create a “new” MDL docket encompassing only the *J.P. Morgan* and *Learjet* cases, and proposing that the cases be transferred away from this Court to the District of Kansas. This forum-shopping was motivated by Plaintiffs’

Plaintiffs argue that the *J.P. Morgan* and *Learjet* cases should not be dismissed on the basis of the filed rate doctrine – as have all of the other nearly identical cases pending before this Court – because application of the filed rate doctrine turns on “plaintiffs’ choice of damage theory,” and Kansas law provides for a damage calculation based on the full consideration paid by plaintiffs. *See* Plaintiffs’ Memorandum at 3. Plaintiffs’ argument is incorrect. Under Kan. Stat. Ann. § 50-101, *et seq.*, for a plaintiff to obtain any recovery, the plaintiff must establish that it was damaged by “artificially higher charges” which were “imposed upon” plaintiff as a result of defendant’s misconduct. *Winters v. Kan. Hosp. Serv. Ass’n, Inc.*, 562 P.2d 98, 101 (Kan. Ct. App. 1977). In their complaints in both *J.P. Morgan* and *Learjet*, Plaintiffs acknowledge this antitrust injury requirement under Kansas law by alleging that they were “injured” by having “paid more for natural gas than they would have paid in the absence of” Defendants’ alleged misconduct. *Learjet* Complaint ¶ 73; *J.P. Morgan* Amended Complaint ¶ 63. In other words, Plaintiffs allege that they were injured because the price they paid for natural gas was higher than it supposedly “would have been” absent Defendants’ alleged misconduct. To grant any relief under Kansas antitrust law, therefore, this Court would have to determine that rates would have been lower in the FERC-supervised interstate natural gas market absent the alleged misconduct. As this Court has properly held, the filed rate doctrine bars a court from making such a determination regarding rates in the FERC-supervised market. *E.g., In re W. States Wholesale Natural Gas Antitrust Litig.*, 368 F. Supp. 2d 1110, 1116 (D. Nev. 2005). Thus,

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dissatisfaction with this Court’s previous dismissal rulings. Acting *sua sponte*, the Panel struck the “new MDL” motion, on the ground that the two cases proposed as a new MDL lacked the requisite multidistrict character, and that therefore the JPML was without jurisdiction to even consider the motion.

Undeterred by the Panel’s *sua sponte* order, Plaintiffs’ counsel yesterday filed a new joint motion, asking the JPML to create a separate MDL docket in Kansas encompassing *J.P. Morgan*, *Learjet*, and a third case also pending in this Court, *Breckenridge Brewery of Colorado v. Oneok, Inc.*, Case No. 06-CV-1351-PMP (PAL). The new motion papers do not address the fact that the earlier motion was summarily rejected, nor disclose that the critical filed rate issue is pending *sub judice* in the *J.P. Morgan* case, and will be fully briefed in the *Learjet* case shortly.

1 the *J.P. Morgan* and *Learjet* cases are indistinguishable from the other cases dismissed by this  
2 Court on the basis of the filed rate doctrine.

3  
4 Indeed, if Plaintiffs were correct that a different outcome is required because the  
5 claims in *J.P. Morgan* and *Learjet* were brought under Kansas rather than California antitrust law,  
6 the result would be to disrupt the uniform regulation of the interstate natural gas market  
7 established by the Natural Gas Act. The Supreme Court ruled in *Arkansas Louisiana Gas Co. v.*  
8 *Hall*, 453 U.S. 571, 579 (1981), that, in order to avoid just such an outcome and to preserve “the  
9 congressional scheme of uniform rate regulation,” the filed rate doctrine bars claims like those of  
10 Plaintiffs here.

11 Moreover, in *California ex rel. Lockyer v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1061  
12 (N.D. Cal. 2003) (“*Lockyer v. Mirant*”), *aff’d sub nom. Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375  
13 F.3d 831 (9th Cir. 2004), the district court, following *Arkansas Louisiana Gas*, dismissed a suit  
14 on the basis of the filed rate doctrine where plaintiff was seeking fixed civil penalties under  
15 California law, rejecting plaintiff’s argument that the doctrine did not apply because the fixed  
16 monetary sanction it sought would not require the court to determine an alternative rate. The  
17 court reasoned that the filed rate doctrine barred plaintiff’s claim because awarding even fixed  
18 civil penalties would in effect “chang[e] the filed rate and unsettle the markets in ways cautioned  
19 against in *Arkansas Louisiana Gas*.” 266 F. Supp. 2d at 1061.

20  
21 Similarly, in the present case, the possibility that Plaintiffs could obtain “full  
22 consideration” relief does not save their claims from dismissal under the filed rate doctrine.  
23 Because the relief sought by Plaintiffs under the Kansas statute would require the Court to  
24 determine what rates would have been in the FERC-supervised interstate market absent  
25 Defendants’ alleged misconduct, it is barred by the filed rate doctrine.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion To Appoint Separate Lead Counsel For The Full Consideration Cases should be denied.

Respectfully submitted,

DATED: Oct 31, 2006

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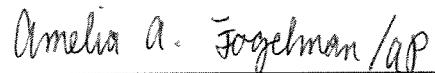
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31st day of October, 2006, a true and correct copy of the foregoing document was served by first class mail to all counsel on the attached service list.

  
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